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No. 99-5525

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

CHARLES THOMAS DICKERSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF OF *AMICUS CURIAE* FRATERNAL ORDER OF POLICE URGING AFFIRMANCE

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QUESTION PRESENTED

Whether a voluntary confession may be admitted into evidence in the government's case-in-chief under 18 U.S.C. Section 3501, notwithstanding that the confession was taken in violation of the requirements of *Miranda v. Arizona*, 384 U.S. 436 (1966).

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BRIEF OF *AMICUS CURIAE* FRATERNAL ORDER OF POLICE URGING AFFIRMANCE

INTEREST OF *AMICUS CURIAE*[1]

The Fraternal Order of Police ("the F.O.P.") is the Nation's largest organization of law enforcement professionals and represents more than 277,000 rank-and-file law enforcement officers in every region of the country. The F.O.P. believes it is particularly important for it to participate in this

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[1] The parties have consented in writing to the filing of this brief in letters that have been submitted to the Clerk. *See* S. Ct. R. 37.3(a). Counsel for a party did not author this brief in whole or in part. *See* S. Ct. R. 37.6. No person or entity other than *amicus curiae* or its counsel made a monetary contribution to the preparation or submission of this brief. *See id.*

case, as a friend of the Court, to provide its views on the current operation of the *Miranda* exclusionary rule and to rebut any suggestion that the views expressed in the briefs of Petitioner's *amici* represent the voice of American law enforcement.

With all respect to those among Petitioner's *amici* who have some experience in law enforcement, particularly those *amici* on the brief filed on behalf of General Griffin B. Bell *et al.* (the "Bell *amici*"), those *amici* have far less experience than the rank-and-file membership of the F.O.P. in implementing *Miranda* in real-life situations that arise in front-line police work. Accordingly, the views of Petitioner's *amici* as to how *Miranda* operates in practice are of limited value in apprising the Court of the law enforcement community's view of *Miranda*. By contrast, the F.O.P. membership represents the segment of American law enforcement that is charged with the responsibility of implementing *Miranda* in the field on a day-to-day basis, and thus the F.O.P. can better provide this Court the views of American law enforcement concerning the impact of *Miranda* on their work in enforcing the Nation's criminal laws.

SUMMARY OF ARGUMENT

Based on the extensive real-world experience of its membership, the F.O.P. strongly supports the decision below.

1. Contrary to the suggestions of Petitioner and his *amici*, American law enforcement agencies have not "learned to live with *Miranda*" in the sense that they find it no obstacle to their task of enforcing the Nation's criminal laws. To the contrary, the members of the F.O.P., who take on the front line of police work across the country, find one of the most frustrating aspects of their jobs to be the release of admitted criminals based on technical errors in administering *Miranda* warnings or securing a waiver of *Miranda* rights. By excluding

even wholly voluntary admissions of guilt whenever there has been the slightest misstep in adhering to *Miranda*'s regime, *Miranda*'s rigid exclusionary rule hinders good faith, professional police work and makes it unnecessarily difficult to take criminals off the streets.

2. Section 3501 of Title 18 of the United States Code is "'the statute governing the admissibility of confessions in federal prosecutions,'" *Davis v. United States*, 512 U.S. 452, 457 n.* (1994) (quoting *United States v. Alvarez-Sanchez*, 511 U.S. 350, 351 (1994)), and it was therefore entirely appropriate for the Fourth Circuit to assess the admissibility of Petitioner's confession according to the standards set forth in that provision. By confirming that Section 3501 governs the admissibility of confessions in federal court, this Court would not need to "overrule" *Miranda*, as some have suggested. The Court has repeatedly made it clear that the *Miranda* regime sets out a number of prophylactic safeguards that are not requirements of the Constitution itself. The Court has, moreover, on numerous occasions endorsed alternatives to previously announced "prophylactic" rules – such as the *Miranda* rule – as sufficiently protective of the core constitutional right at issue (here, the right against compelled self-incrimination), *without overruling the decision that announced the prophylactic rule*. That is the course the Court should follow here. Indeed, Section 3501 expressly mentions the giving of *Miranda*-like warnings as a factor for a court to consider in determining whether a confession was voluntary (and thus admissible), which suggests that *Miranda* should remain good law as a safe harbor for police who want to ensure that statements they obtain will be admissible in court.

3. This case vividly illustrates the virtue of the Section 3501 approach. Application of the *Miranda* exclusionary rule here would have resulted in the suppression of a serial bank robber's voluntary confession, due to a finding

of a technical violation of the *Miranda* rules. By refocusing the court's inquiry on the core constitutional question of whether the suspect's confession was voluntary, however, Section 3501 ensured that a finding of a technical error – an error that resulted in no *actual constitutional injury* to Petitioner – did not trigger the drastic remedy of exclusion of a voluntary confession.

As illustrated by this case, therefore, Section 3501 represents a "win-win" solution. On the one hand, the statute not only provides ample sanction to ensure that law enforcement officers do not cause *actual constitutional harm* by coercing a suspect into an involuntary confession; it also retains strong incentives for police to continue unchanged their current practice in administering *Miranda*'s prophylactic warnings. The statute, after all, expressly lists the *Miranda* warnings as factors to be considered by a court in determining whether a confession is voluntary and admissible. Continued adherence to *Miranda* will thus provide police a safe harbor virtually ensuring the admissibility of any statements they obtain from suspects. For this reason, the F.O.P. fully expects law enforcement officers to continue to give *Miranda* warnings even under a Section 3501 regime.

On the other hand, Section 3501 also has the added virtue – to victims of crime, to law enforcement officers, and to the Nation – of redirecting the courts' attention to the constitutional requirement of *voluntariness*. As a result, the statute will ensure that technical errors by law enforcement personnel no longer will *automatically* result in the suppression of voluntary confessions. A decision reaffirming the primacy of Section 3501 would thus continue to protect the constitutional rights of the accused, while reducing significantly the current high cost of *Miranda*'s prophylactic rule.

Finally, the "practical" arguments that have been advanced against Section 3501 do not withstand scrutiny. As this Court has recognized on several occasions, *Miranda* is far from the easily administered, "bright line" rule that some claim. And the supposed "obvious flaws" of the regime under Section 3501, under which warnings would no longer be compelled by an iron-clad exclusionary rule, are neither obvious nor logical.

ARGUMENT

I. *Miranda*'s Rigid Exclusionary Rule – Often Requiring the Exclusion of Entirely Voluntary Statements Due to Technical Errors Determined Only Years After the Fact – Imposes Significant Costs in Hindering Law Enforcement's Efforts To Solve Crimes and Take Criminals Off the Streets.

The F.O.P. wishes to respond, first and foremost, to assertions made by Petitioner and his *amici* urging reversal of the decision below in part on the policy-based ground that law enforcement officers have learned to "live with *Miranda*" and that there is no point in even considering enforcing a statute that would alter the operation of the rigid exclusionary rule established by that case. On behalf of its nearly 300,000 members, the F.O.P. feels compelled to dispel the fallacies in such assertions.

If Petitioner simply means to say that law enforcement officers have done (and will continue to do) their very best to follow whatever rules the Supreme Court establishes, it is certainly true that the law enforcement community has learned to "live with *Miranda*." Likewise, if Petitioner means to say that police officers have (by and large) learned the standard four-line script of the *Miranda* warnings, it is indeed accurate to say that law enforcement has learned to "live with *Miranda*." If, however, Petitioner means to say that the law enforcement community is content with the operation of *Miranda* and its

impact on efforts to enforce the Nation's criminal laws such that it does not seek improvements on the current *Miranda* regime, then it is decidedly *not* the case that officers have learned to live with *Miranda*.

The current *Miranda* regime has certain benefits, but it also suffers from significant and well-chronicled flaws. As the F.O.P. has recently explained to Congress, the simple fact of the matter is that the *Miranda* regime interferes with the ability of police officers to solve violent crimes and take dangerous criminals off the streets. *See, e.g.*, Voluntary Confessions and the Enforcement of Section 3501, Title 18, U.S. Code: Hearing Before the Subcomm. on Criminal Justice Oversight of the Sen. Judiciary Comm., 106th Cong., 1st Sess. 23 (1999) (statement of Gilbert G. Gallegos, President, Grand Lodge, Fraternal Order of Police); Memorandum from Richard A. Fiano, Chief, Domestic Operations, Drug Enforcement Administration (Oct. 13, 1999) (lodged by the United States, Feb. 24, 2000) (describing "chilling effect" of *Miranda* warnings on DEA investigations); *Davis v. United States*, 512 U.S. 452, 465 (1994) (Scalia, J., concurring) (federal government's repeated refusal to invoke Section 3501 rather than *Miranda* "may have produced . . . the acquittal and the nonprosecution of many dangerous felons, enabling them to continue their depredations upon our citizens. There is no excuse for this."); *Withrow v. Williams*, 507 U.S. 680, 704 (1993) (O'Connor, J., concurring in part and dissenting in part) (stating, with respect to the *Miranda* exclusionary rule, that "[a]ny rule that so demonstrably renders truth and society 'the loser,' bear[s] a heavy burden of justification, and must be carefully limited to the circumstances in which it will pay its way by deterring official lawlessness'") (citation omitted).

The main culprit is not simply the *Miranda* warnings themselves, which suspects have often heard time and again, and which are easily memorized by police officers. Rather, the

barrier to effective police work comes primarily from two other aspects of the *Miranda* regime working in tandem.

First, implementing *Miranda* requires officers to make subtle determinations in often difficult circumstances – determinations including when a stop has matured into "custody" (triggering the need for warnings) and whether a waiver is valid. *See infra* p. 22. Thus, adhering to all the refinements of the regime established by *Miranda* and its progeny is simply not, as Petitioner suggests, "an extraordinarily simple act." Petr. Br. 44.

Second, *Miranda*'s rigid exclusionary rule prevents the use even of voluntary confessions if a police officer has committed even a technical violation of *Miranda* (or its progeny). If an officer misjudges when a suspect has been placed in custody and asks even a single question that elicits an incriminating response, a court will later suppress the statement and an admitted criminal may well go free. As this Court has acknowledged, *Miranda* imposes burdens "on law enforcement agencies and the courts by requiring the suppression of trustworthy and highly probative evidence even though the confession might be voluntary under traditional Fifth Amendment analysis." *Fare v. Michael C.*, 442 U.S. 707, 718 (1979). *See also Withrow*, 507 U.S. at 707 (O'Connor, J., concurring in part and dissenting in part) ("*Miranda*'s prophylactic rule is not merely 'divorced' from the quest for truth but at war with it as well.").

American law enforcement has emphatically *not* learned to "live with" these shortcomings of *Miranda*. Indeed, the exclusion of voluntary confessions as a result of technical errors in applying *Miranda* ranks as one of the most frustrating experiences faced by the F.O.P.'s members. As F.O.P. President Gilbert Gallegos recently explained to Congress, virtually every officer on the street can recall a list of cases on

which he or she worked in which an admittedly guilty defendant was released because, months or years after the police had finished their work, a technical violation of *Miranda* was found that resulted in suppression of a voluntary statement. The rigid *Miranda* exclusionary rule – which this Court indicated from the outset was merely "prophylactic" in nature, and was not intended to represent the only possible means of protecting a suspect's constitutional rights – is thus not a rule that law enforcement views as reflecting the optimal balance between protecting suspects' rights and ensuring efficient enforcement of the law.

II. There Is No Need To Overrule *Miranda* To Affirm the Decision Below and Confirm That Section 3501 Is "The Statute Governing the Admissibility of Confessions In Federal Prosecutions."

One of the principal arguments advanced by Petitioner and his *amici* is that to uphold the decision below (and to affirm the validity of Section 3501) would require "overruling" *Miranda*. The Fourth Circuit correctly rejected that theory. The *Miranda* rules are merely "prophylactic," and the Court has demonstrated repeatedly that it is possible to uphold an alternative to a prophylactic rule without overruling the decision that initially set forth the rule. The F.O.P. respectfully urges the Court to adopt that approach once again here.

A. *Miranda*'s Prophylactic Regime Is Not Dictated by the Constitution Itself.

Time and again the Court has emphasized that "[t]he prophylactic *Miranda* warnings . . . are 'not themselves rights protected by the Constitution but [are] instead measures to insure that the right against compulsory self-incrimination [is] protected.'" *New York v. Quarles*, 467 U.S. 649, 654 (1984) (quoting *Michigan v. Tucker*, 417 U.S. 433, 444 (1974)); *Oregon v. Elstad*, 470 U.S. 298, 305 (1985) (same). *See also*

Davis v. United States, 512 U.S. 452, 457 (1994) (*Miranda* warnings are "a series of *recommended* procedural safeguards" that are "not themselves rights protected by the Constitution") (emphasis added). Thus, the Court has explained that the "*Miranda* exclusionary rule . . . sweeps more broadly than the Fifth Amendment itself" and "may be triggered even in the absence of a Fifth Amendment violation." *Oregon v. Elstad*, 470 U.S. 298, 306 (1985). *See also Moran v. Burbine*, 475 U.S. 412, 424 (1986) ("As is now well established, the *Miranda* warnings are not themselves rights protected by the Constitution."); *Withrow*, 507 U.S. at 706-07 (O'Connor, J., concurring in part and dissenting in part) ("[T]here is no constitutional right to the suppression of *voluntary* statements. Quite the opposite: The Fifth Amendment, by its terms, prohibits only *compelled* self-incrimination; it makes no mention of 'unwarned' statements. On that much, our cases could not be clearer.") (emphases in original). As a result, as Justice O'Connor has succinctly summarized, "[t]he *Miranda* rule is not, nor did it ever claim to be, a dictate of the Fifth Amendment itself." *Duckworth v. Eagan*, 492 U.S. 195, 209 (1989) (O'Connor, J., concurring).

In his effort to portray the *Miranda* warnings as inexorable commands of the Fifth Amendment, Petitioner repeatedly asserts that it is crucial to *inform* a suspect of his rights, to ensure that privileges under the Fifth Amendment are knowingly exercised or waived. *See, e.g.*, Pet. Br. 16, 38. According to Petitioner, the right to be free from compelled testimony inherently demands that a suspect must subjectively *know* that he has a constitutional right to refuse to speak. But the nature of the right Petitioner describes is not found in this Court's precedents and distorts the protection the Fifth Amendment provides. Petitioner's approach suggests that part of the critical constitutional value to be protected under the Fifth Amendment is the individual's ability to make a decision

whether or not to speak to the police only while fully aware of the exact extent of his right to refuse to talk – in other words, that a suspect has only been afforded the protection intended by the Framers of the Fifth Amendment if he is specifically informed of the nature of his right to refuse to speak to the authorities investigating a crime. But the Fifth Amendment provides a limitation on the *government* to ensure that *government agents* do not coerce a suspect to talk. If a criminal suspect has not been subjected to any police measures that overcome his will or that compel him to speak, and he makes a *voluntary* statement, the rights secured by the Constitution have been fully vindicated. The strictures of the Fifth Amendment, in other words, are not designed to promote an abstract value in ensuring that suspects speak to the police only while fully aware of all of their rights. As long as the individual is free from official compulsion, the constitutional commands have been satisfied.

In that regard, it is worth noting a distinction between the right secured by the Fifth Amendment and other individual rights protected by the Constitution. Under the Sixth Amendment, for example, once judicial criminal proceedings have commenced against an individual and the Sixth Amendment right to counsel attaches, *see, e.g.*, *United States v. Gouveia*, 467 U.S. 180, 187 (1984), it is typically assumed that it promotes the proper functioning of our adversarial system of justice and the efficient search for truth if a defendant is represented by counsel. *See, e.g.*, *Maine v. Moulton*, 474 U.S. 159, 168-69 (1985); *United States v. Cronic*, 466 U.S. 648, 656 (1984) ("Unless the accused receives the effective assistance of counsel, a serious risk of injustice infects the trial itself.") (internal citations and quotations omitted).

Petitioner's arguments tacitly rest on the assumption that promoting the exercise of the "right to remain silent" (which is really only a verbal formulation describing the *result*

of guaranteeing that individuals must be free from compelled testimony) is somehow in itself a positive objective of the Fifth Amendment. Once again, that distorts the nature of the right. To be sure, individuals are free not to talk to the police under the Fifth Amendment, and vigilantly guarding the individual's right to be free from compulsion and to choose that course is vital to preserving a free society. But the value to individual freedoms that comes from preserving that right derives from the restriction on government action precluding the resort to coercion to obtain statements from criminal suspects. There is nothing about silence in the face of a lawful investigation of criminal conduct that is, *in itself*, a positive good.

To the contrary, as this Court has repeatedly recognized, voluntary "[a]dmissions of guilt are more than merely 'desirable,' they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law." *Moran*, 475 U.S. at 426 (citation omitted). *See also Elstad*, 470 U.S. at 305 ("[A]dmissions of guilt by wrongdoers, if not coerced, are inherently desirable.") (citation and internal quotations omitted). *Cf. Withrow*, 507 U.S. at 703 (O'Connor, J., concurring in part and dissenting in part) ("[B]ecause *voluntary* statements are 'trustworthy' even when obtained without proper warnings, their suppression actually *impairs* the pursuit of truth by concealing probative information from the trier of fact.") (emphases in original) (citation omitted); *Minnick v. Mississippi*, 498 U.S. 146, 155 (1990) ("Both waiver of rights and admission of guilt are consistent with the affirmation of individual responsibility that is a principle of the criminal justice system."). If a suspect in custody talks to the police free from compulsion, whether or not he was fully aware of the complete panoply of rights afforded to him under the Constitution, he has still suffered no constitutional injury and the purposes and objectives of the Fifth Amendment have been fully served.

An analogy to this Court's jurisprudence under the Fourth Amendment helps illustrate the point. The Fourth Amendment guarantees individuals a "right" to be "secure . . . against unreasonable searches and seizures." U.S. Const., amend. IV. But an individual's rights under the Fourth Amendment plainly would not be violated if police asked for and obtained consent to search his house without first explaining that he could freely refuse consent. As long as the individual has voluntarily consented, the search is not unreasonable and the protections established in the Constitution have been fully vindicated. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 242-89 (1973).

Thus, by arguing that a suspect must have subjective knowledge of the "right to remain silent" for his Fifth Amendment rights to be preserved at all, Petitioner is seeking to change the nature of the protection provided by the Fifth Amendment. The new principle that Petitioner seeks to have the Court adopt is that "[w]ithout knowledge on the part of the individual being questioned as to what choices are available to him, statements cannot be deemed truly voluntary." Petr. Br. 3.[2] But the Court has long recognized that rights under the Constitution designed to protect an individual from compulsion and to preserve voluntary action do *not* necessarily require that an individual have subjective knowledge of the exact right conferred by the Constitution. As the Court explained in *Edwards v. Arizona*, 451 U.S. 477 (1981), *Schneckloth* "emphasized that the voluntariness of a consent or an admission

[2] Petitioner tacitly acknowledges the shift in understanding of the Fifth Amendment he seeks as he notes that "[w]hile expressed as a limitation on government power," in his view the constitutional command "necessarily means that the individual has an *affirmative right* to remain silent, and any waiver must be knowing, intelligent, and voluntary." Petr. Br. 38 (emphasis added).

on the one hand, and a knowing and intelligent waiver on the other, are discrete inquiries" *id.* at 484.[3] Petitioner would collapse the distinction. As Petitioner himself distills the core of his argument, he seeks to have the Court hold as a matter of constitutional law that, "[s]imply put, . . . no choice is voluntary where an inquisitor withholds critical information about the choice." Petr. Br. 16.

Adopting Petitioner's conception of the nature of voluntariness would have implications far beyond the confines of this case. Indeed, if the Court were to accept Petitioner's proposed expansion of *Miranda*, there would be no logical stopping point to Petitioner's version of "voluntariness" that would limit it from applying in the Fourth Amendment context as well. As a result, Petitioner's self-declared principle that "no choice is voluntary where an inquisitor withholds critical information about the choice," Petr. Br. 16, would, if adopted, likely require the Court next to reconsider its holding in *Schneckloth* that consent for a search may be voluntary under

[3] It is true, as Petitioner points out, *see* Petr. Br. 35, that in *Davis v. United States*, 512 U.S. 452 (1994), the Court noted that "[t]he right to counsel recognized in *Miranda* is sufficiently important to suspects in criminal investigations, we have held, that it requires the special protection of the knowing and intelligent waiver standard." *Id.* at 458 (internal quotations and alterations omitted). In the very same discussion, however, the *Davis* Court made clear that "[t]he right to counsel established in *Miranda* was one of a 'series of recommended procedural safeguards . . . [that] were not themselves rights protected by the Constitution but were instead measures to insure that the right against compulsory self-incrimination was protected.'" *Id.* at 457 (quoting *Michigan v. Tucker*, 417 U.S. 433, 443-44 (1974)). The mere fact that the Court decided to apply a high waiver standard to the prophylactic "right" it created does not change the underlying non-constitutional nature of the right, nor does it make the waiver standard the Court has applied a constitutional requirement itself.

the Fourth Amendment even absent a warning that the individual was free to withhold consent.[4]

From the foregoing it should be plain that neither precedent nor reason suggest that *Miranda*'s commands are inexorable requirements of the Constitution itself or that a criminal suspect must be expressly informed of his rights under the Fifth Amendment for his right to be free from compulsion to be respected. Instead, in *Miranda* the Court was self-consciously reconciling opposing interests to establish a prophylactic rule that went further than the Constitution required to protect underlying constitutional rights. As the Court has explained, "[a]s any reading of *Miranda* reveals, the decision . . . embodies a carefully crafted balance designed to fully protect both the defendant's and society's interests." *Moran*, 475 U.S. at 433 n.4 (emphasis omitted).

Section 3501 simply represents the considered judgment of the elected representatives of the People that in crafting a prophylactic rule that "overprotects" the rights secured by the Fifth Amendment, *Duckworth v. Eagan*, 492 U.S. 195, 209 (1989) (O'Connor, J., concurring), that "sweeps more broadly than the Fifth Amendment itself," *Oregon v. Elstad*, 470 U.S. 298, 306 (1985), and that inevitably will require the exclusion of some voluntary confessions where the suspect "has suffered no identifiable constitutional harm," *id.* at 307, *Miranda* did not strike the proper balance. In Congress's view, society simply pays too high a price when it adheres rigidly to *Miranda*'s overprotective exclusionary rule and thereby permits – often on the basis of a technical error determined by a court only years

[4] The *Schneckloth* Court itself acknowledged the logical link between the voluntariness inquiry under the Fifth and Fourth Amendments by applying the voluntariness test developed in Fifth Amendment and Fourteenth Amendment cases concerning confessions to the Fourth Amendment search context. *See Schneckloth*, 412 U.S. at 223-25.

after a police officer on the street has done his best to adhere to *Miranda*'s dictates – "the release of an admittedly guilty individual who may pose a continuing threat to society." *Duckworth v. Eagan*, 492 U.S. 195, 211 (O'Connor, J., concurring).[5] Congress, in other words, has simply determined that it should apply more broadly the same conclusion that this Court has reached in limiting the application of *Miranda* in subsequent cases; namely, that "[i]f errors are made by law enforcement officers in administering the prophylactic *Miranda* procedures, they should not breed the same irremediable consequences as police infringement of the Fifth Amendment itself." *Elstad*, 470 U.S. at 309. The F.O.P. emphatically agrees with Congress's judgment.

Moreover, it is plainly a judgment that, under our constitutional structure, Congress is allowed to make. If *Miranda*'s rigid exclusionary rule for any and all failures to comply with the details of *Miranda*'s warning procedures is not an inevitable command of the Fifth Amendment itself, it is open to Congress to define a standard for admissibility of self-incriminating statements in federal courts that hews more closely to the constitutional line. Indeed, it is precisely the Legislative branch that is best positioned to make judgments about where – among constitutionally permissible alternatives – to draw the line. It can hardly be disputed that Congress is far better suited than this Court to gather and evaluate evidence concerning the effects that different rules might have on the

[5] *Cf. Duckworth*, 492 U.S. at 209 (O'Connor, J., concurring) ("In the name of efficient judicial administration of the Fifth Amendment guarantee and the need to create institutional respect for Fifth Amendment values, [*Miranda*] *sacrifices society's interest* in uncovering evidence of crime and punishing those who violate its laws.") (emphasis added); *Elstad*, 470 U.S. at 312 (when an admission is not coerced, "little justification exists for permitting the highly probative evidence of a voluntary confession to be irretrievably lost to the factfinder").

successful enforcement of the criminal statutes that Congress passes.[6] *See, e.g.*, *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 330 n.12 (1985). As Justice Kennedy recently wrote for the Court, "[o]ur national experience teaches that the Constitution is preserved best when each part of the Government respects both the Constitution and the proper actions and determinations of the other branches." *City of Boerne v. Flores*, 521 U.S. 507, 535-36 (1997). Here, Congress validly exercised its authority to define the admissibility of self-incriminating statements in federal courts, and this Court should enforce Congress's decision.

B. The Court Need Not Overrule *Miranda* To Enforce Section 3501.

Because *Miranda* did not purport to identify an inexorable command of the Constitution, the Court need not overrule that decision to uphold Section 3501. In similar situations, where the Court has confronted prophylactic measures of its own creation – measures not required by the Constitution itself but adopted to "safeguard" constitutional rights – the Court has repeatedly made clear that deviations from its prophylactic rules are acceptable *provided that* the underlying constitutional right at stake is not infringed. And,

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[6] For this reason, the F.O.P. believes that the various studies the parties and *amici* cite concerning the impact of *Miranda* are largely beside the point. The question before this Court is a legal one: namely, whether *Miranda* embodies an inevitable command of the Fifth Amendment. The efforts of Petitioner's *amici* to amass studies and data purportedly demonstrating that *Miranda* has no negative impact on police clearance rates, or that suspects make false confessions without *Miranda* warnings, or any other number of points, *see, e.g.*, ACLU Br. 23 *et seq.* ("Data Confirm That *Miranda* Does Not Impede Law Enforcement"), simply confirm that the task of drawing any line more protective than that demanded by the Constitution is a policy task for which the political branches are far better suited than this Court.

significantly, in the cases where the Court has approved alternatives to its prophylactic rules, *it has not "overruled" the decisions setting forth the prophylactic rules*: those decisions have remained in place, serving as "safe harbors" for those wary of experimenting with alternatives.

The most recent illustration of this practice occurred earlier this Term, in *Smith v. Robbins*, 120 S. Ct. 746 (2000), in which the Court examined, and upheld, the procedure that has been adopted by the State of California to protect a defendant's constitutional right to appellate counsel. California's procedure – the "*Wende* procedure" – "departs in some respects" from the procedure that this Court described in *Anders v. California*, 386 U.S. 738 (1967), for protecting the right of appellate counsel.[7] On that basis it had been declared constitutionally inadequate by the Ninth Circuit. This Court reversed, emphasizing that "[t]he procedure [the Court] sketched in *Anders* is a prophylactic one; the States are free to adopt different procedures, so long as those procedures adequately safeguard a defendant's [constitutional] right to appellate counsel," 120 S. Ct. at 753, and concluding that "the *Wende* procedure, like the *Anders* . . . procedure[], . . . affords adequate and effective appellate review for criminal indigents," *id.* at 763.

In explaining its ruling, the Court described the *Anders* rule in terms virtually indistinguishable from the terms the Court has used to describe *Miranda* – *i.e.*, as a "prophylactic" rule that is not constitutionally required, but rather serves to

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[7] Specifically, "[u]nlike under the *Anders* procedure, counsel following *Wende* neither explicitly states that his review has led him to conclude that an appeal would be frivolous . . . nor requests leave to withdraw. Instead, he is silent on the merits of the case and expresses his availability to brief any issues on which the court might desire briefing." *Robbins*, 120 U.S. at 753.

safeguard an underlying constitutional right. Thus, the Court recalled that

> In *Pennsylvania v. Finley*, 481 U.S. 551 (1987), we explained that the *Anders* procedure is *not 'an independent constitutional command,'* but rather is *just 'a prophylactic framework'* that we established to vindicate the constitutional right to appellate counsel . . . . We did not say that our *Anders* procedure was the *only* prophylactic framework that could adequately vindicate this right; instead, by making it clear that the Constitution itself does not compel the *Anders* procedure, we suggested otherwise. Similarly, in *Penson v. Ohio*, 488 U.S. 75 (1988), we described *Anders* as simply erecting *'safeguards.'* *Id.* at 80.

120 S. Ct. at 757 (emphases added).

Significantly, the Court in no way "overruled" *Anders* in upholding the *Wende* procedure. *See, e.g., id.* at 763 ("[T]he *Wende* procedure, *like the Anders . . . procedure[], . . . affords adequate and effective appellate review for criminal indigents.*") (emphasis added). (Indeed, the Court was unmoved by the dissent's argument that "the Court has effectively overruled [*Anders*]." *Robbins*, 120 S. Ct. at 766 (Stevens, J., dissenting).) A State that does not want to incur the risk that its alternative procedure for protecting the right to appellate counsel will be declared invalid (or the expense of litigation) thus remains free to follow *Anders*.

While Petitioner does not even mention *Robbins*, the decision vividly illustrates that the Court need not "overrule" a decision setting forth a prophylactic rule to uphold an alternative procedure that provides fewer safeguards but still adequately protects the core constitutional right at issue.

The Court adhered to the same principle in *Lewis v. Casey*, 518 U.S. 343 (1996). Two decades before *Lewis*, in *Bounds v. Smith*, 430 U.S. 817, 828 (1977), the Court had held that "the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law." In *Lewis* itself, a district court declared the Arizona Department of Corrections ("ADOC") to be in violation of *Bounds*, based on "a variety of shortcomings of the ADOC system, in matters ranging from the training of library staff, to the updating of legal materials, to the availability of photocopying services," 518 U.S. at 346, and ordered broad injunctive relief. This Court reversed, finding that the district court had failed "to identify anything more than isolated instances of *actual injury*." *Id.* at 349 (emphasis added).

In explaining what "actual injury" must be shown to establish a *Bounds* violation, this Court stressed that – contrary to the district court's apparent belief – *Bounds* had not established a "right to a law library or to legal assistance"; rather, "[t]he right that *Bounds* acknowledged was the (already well-established) right of access to the courts." *Id.* at 350 (emphasis omitted). As it did recently in *Robbins*, the Court in *Lewis* drew a sharp distinction between the constitutional right at issue (the right of access to the courts) and the prophylactic measures (law libraries and legal assistance) that had previously been approved as *one possible method* for protecting that core right.

> Although it affirmed a court order requiring North Carolina to make law library facilities available to inmates, [*Bounds*] stressed that that was *merely* "*one constitutionally acceptable method* to assure meaningful access to the courts," and that "our decision here ... does not

> foreclose alternative means to achieve that goal." [*Bounds*,] 430 U.S. at 830. In other words, prison law libraries and legal assistance programs are not ends in themselves, but only the means for ensuring "a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts." *Id.* at 825. . . . [A]n inmate cannot establish relevant actual injury simply by establishing that his prison's law library or legal assistance program is subpar in some theoretical sense. . . . Insofar as the right vindicated by *Bounds* is concerned, "meaningful access to the courts is the touchstone" . . . .

Lewis, 518 U.S. at 350-51 (emphasis added).

Again, it bears emphasizing that while making clear that *Bounds*' "libraries-and-legal-assistance" formula was not the only acceptable means of protecting the constitutional right of access to the courts,[8] *Lewis* did not "overrule" *Bounds*. Indeed, the Court's refusal to overrule *Bounds* was in part what prompted Justice Thomas to write a separate concurrence. *See Lewis*, 518 U.S. at 365 (Thomas, J., concurring) ("I write separately to make clear my doubts about the validity of *Bounds* . . . .").

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[8] *Lewis* reached this conclusion notwithstanding the statement in *Bounds* that "the fundamental constitutional right of access to the courts *requires* prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law." *Bounds*, 430 U.S. at 828 (emphasis added). This confirms that *Miranda*'s suggestions – so heavily relied on by Petitioner and his *amici* – to the effect that any alternative to *Miranda must* "appris[e] accused persons of their right of silence," *e.g.*, *Miranda v. Arizona*, 384 U.S. 436, 467 (1966), cannot be read as rigidly as Petitioner urges.

Robbins and *Lewis* are thus two recent examples of instances in which the Court has endorsed (as sufficient to protect the core constitutional right at stake) an alternative to a "prophylactic" measure announced in a prior decision, without "overruling" that prior decision. That is the course the Court should follow here. It is not necessary to "overrule" *Miranda* to confirm that Section 3501 is a constitutionally acceptable framework for assessing the admissibility of confessions and for protecting the core right at issue (namely, a suspect's right to be free from compelled self-incrimination). From the time *Miranda* was decided (and indeed in *Miranda* itself), the Court repeatedly has made clear that the *Miranda* approach was never intended to be exclusive or to foreclose experimentation. And Section 3501 represents precisely the sort of alternative rule that the Court has approved in analogous cases – a rule that focuses the judicial inquiry on the relevant question whether an actual constitutional right has been violated. Section 3501 therefore should be upheld as a constitutionally permissible alternative to the prophylactic *Miranda* warnings, with *Miranda* left in place as a safe harbor for law enforcement personnel.

III. The Principal "Practical" Arguments Raised Against Section 3501 Do Not Withstand Scrutiny; To the Contrary, Section 3501 Represents the Best of Both Worlds.

A. *Miranda*'s "Bright Lines" Are Not So Bright.

One of the principal virtues of the *Miranda* regime, according to Petitioner and his *amici*, is that *Miranda* is supposedly an easily administered "bright line" rule. From the perspective of the F.O.P.'s membership, that is a vast oversimplification.

Although the *text* of the *Miranda* warnings may be clear, and perhaps even familiar to most sixth-graders, applying

Miranda in the field requires more than memorizing a four-line script. *Miranda* and its progeny require police officers to make instant, on-the-spot determinations on subtle questions that can easily divide panels of judges far better trained in the nuances of the law. Thus, officers must decide such matters as whether, for example, a routine traffic stop has evolved into a situation in which the suspect is in "custody," *see Berkemer v. McCarty*, 468 U.S. 420 (1984); whether a discussion has matured into an "interrogation," *see Rhode Island v. Innis*, 446 U.S. 291 (1980); whether a suspect has adequately waived his *Miranda* rights, *see North Carolina v. Butler*, 441 U.S. 369 (1979); whether a suspect's statement amounts to an unambiguous request for counsel, *compare Edwards v. Arizona*, 451 U.S. 477 (1981), *with Davis v. United States*, 512 U.S. 452 (1994); and whether any of the exceptions to *Miranda* applies, *see, e.g., New York v. Quarles*, 467 U.S. 649 (1984) ("public safety" exception); *Pennsylvania v. Muniz*, 496 U.S. 582, 601-02 (1990) ("routine booking" exception). The lines in these areas are hazy, not bright.[9] As this Court has expressly recognized, for example, "the task of defining 'custody' is a slippery one, and policemen investigating serious crimes cannot realistically be expected to make no errors whatsoever." *Oregon v. Elstad*, 470 U.S. 298, 309 (1985). *See also id.* at 316 (the question "of when 'custody' begins" can be "murky and difficult").

In praising the supposed simplicity of the *Miranda* regime, the Bell *amici* gloss over such difficult questions. In their view, *Miranda* is easy to apply because, *"[a]ssuming* that a suspect is in custody at the start of the interrogation, either the

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[9] Notwithstanding their avowed support of *Miranda*, the Bell *amici* readily acknowledge that they consider some cases in the *Miranda* line to have been wrongly decided. *See* Bell Br. 5, 26. That is a significant admission, because these cases have contributed substantially to the blurring of the supposedly clear lines of *Miranda*.

warnings were given and a waiver was obtained, or they were not." Bell Br. 19 (emphasis added). But if one does not merely assume away the difficult problems, it is plain that "*Miranda* creates as many close questions as it resolves." *Withrow v. Williams*, 507 U.S. 680, 711-12 (1993) (O'Connor, J., concurring in part and dissenting in part). *See also* Voluntary Confessions and the Enforcement of Section 3501, Title 18, U.S. Code: Hearing Before the Subcomm. on Criminal Justice Oversight of the Sen. Judiciary Comm., 106th Cong., 1st Sess. 23 (1999) (statement of Gilbert G. Gallegos, President, Grand Lodge, Fraternal Order of Police).

For officers in the field, a mistaken assessment of the circumstances as events are rapidly unfolding – even a good-faith assessment that is declared "mistaken" only years later, based on review in the far-removed confines of a judge's chambers – can, under the *Miranda* regime, result in the suppression of an entirely voluntary statement, the frustration of good-faith and professional police work, and in the release of an admitted criminal. It is inevitable, moreover, that such mistakes will occur. *See, e.g., Quarles*, 467 U.S. at 656 (recognizing the "kaleidoscopic situation[s] . . . confronting [law enforcement] officers" in investigating crimes); *Michigan v. Tucker*, 417 U.S. 433, 446 (1974) ("[T]he law . . . cannot realistically require that policemen investigating serious crimes make no errors whatsoever.").

B. Section 3501 Represents the Best of Both Worlds: It Retains Incentives for Law Enforcement Officers To Provide Warnings and Ensures that Voluntary Confessions Will Not Be Excluded Due to Technical Errors.

Section 3501 promises to bring a long-needed improvement to the law. In the F.O.P.'s view, the statute represents the best of both worlds. On the one hand, Section

3501 preserves the best aspects of *Miranda*. Of course, it should go virtually without saying that the statute continues to give police officers ample incentive to ensure that a suspect's constitutional rights are not violated – under Section 3501 no less than under *Miranda*, a statement obtained in violation of the Fifth Amendment is excluded at trial. In addition, by expressly listing the elements of the *Miranda* warnings among the factors to be considered in assessing voluntariness, Section 3501 also continues to provide officers a strong incentive to administer the prophylactic *Miranda* warnings. A statement obtained after proper *Miranda* warnings, after all, is virtually certain to be found voluntary. *See, e.g.*, *Berkemer*, 468 U.S. at 433 n.20 ("[C]ases in which a defendant can make a colorable argument that a self-incriminating statement was 'compelled' despite the fact that the law enforcement authorities adhered to the dictates of *Miranda* are rare."). Continued adherence to *Miranda*'s procedures will thus provide law enforcement officers with a valuable safe harbor – an opportunity virtually to ensure that statements they obtain in the course of their investigations will later be held admissible in court. As the court below explained, under Section 3501, "providing the four *Miranda* warnings is still the best way to guarantee a finding of voluntariness." J.A. 211.

Indeed, it bears noting that the benefits some of Petitioner's *amici* see in *Miranda* as an affirmative *aid* in police work would still apply with full force under Section 3501 and thus further tend to confirm that *Miranda* warnings will still be given. The ACLU, for example, argues that *Miranda* provides valuable guidance to police concerning procedures to follow to ensure that suspects' statements will be admissible and aids interrogations by tending to establish some level of trust or confidence with the suspect. *See* ACLU Br. 19-20. To the extent the *Miranda* warnings yield these benefits, they will continue unabated even if Section 3501 supplies the rule on

admissibility, and thus these benefits only further confirm that officers attempting to solve crimes and clear cases will continue to administer the warnings. There is no reason to think that warnings that further police objectives in securing convictions of guilty criminals will be dropped simply because they are no longer required by an iron-clad rule. As a result, the F.O.P. fully expects that, if Section 3501 is upheld, officers will routinely continue to give *Miranda* warnings for the simple reason that the warnings will aid successful prosecutions by ensuring that statements obtained by police can be used at trial.[10]

At the same time, Section 3501 addresses the glaring shortcomings of the *Miranda* regime by making the voluntariness of a confession, rather than technical compliance with *Miranda*'s prophylactic procedures, the touchstone of admissibility. Section 3501 thus holds the promise of continuing copious protection of criminal suspects' underlying constitutional rights, while substantially reducing the high costs of the *Miranda* regime.

The various *amici* that have argued against upholding Section 3501, while exaggerating the clarity of *Miranda* and its progeny, have also vastly overstated purported difficulties under Section 3501 – particularly the supposed morass of difficult voluntariness determinations that would be thrust upon the courts under the statute. This parade of horribles is doubly flawed. First, the Bell *amici* improperly assume that under

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[10] *See* J.A. 210-11 ("[L]est there be any confusion on the matter, nothing in today's opinion provides those in law enforcement with an incentive to stop giving the now familiar *Miranda* warnings.") *See also* Memorandum from Larry R. Parkinson, General Counsel, Federal Bureau of Investigation (Oct. 19, 1999) (lodged by the United States, Feb. 24, 2000) ("Regardless of the outcome of [this case], the FBI will not alter its policy" of giving warnings listed in *Miranda*).

Section 3501, *Miranda* warnings will cease to be given entirely and thus that *every case* will require a broad-ranging inquiry into an undifferentiated host of factors bearing on voluntariness. But this tacit assumption that police will instantly abandon current practices and revert to pre-*Miranda* procedures is entirely unrealistic. It wholly ignores the powerful incentives that police will have under Section 3501 to continue administering *Miranda* warnings – incentives that, as explained above, will ensure that in the overwhelming majority of cases such warnings will still be given. And for that very reason, the voluntariness inquiry will be vastly simplified. Even today, after all, under the *Miranda* regime, a defendant *can* argue that a statement made after proper *Miranda* warnings was actually coerced. That inquiry is not thought to place a great burden on the courts for the simple reason that it would take extraordinary circumstances to show that *Mirandized* statements were actually compelled. *See Berkemer*, 468 U.S. at 433 n.20. The same common-sense conclusion would undoubtedly apply no less under the totality-of-the-circumstances test under section 3501. As a result, wherever *Miranda* warnings were given, the inquiry into voluntariness would continue to be streamlined and easily manageable.

Second, even where *Miranda*-like warnings were not given to a suspect, there is simply no basis for assuming that a voluntariness standard, such as that of Section 3501, would necessarily be more difficult to apply than *Miranda*. *See* Bell Br. 13-17. Justice O'Connor disposed of that contention in her separate opinion in *Withrow*:

> [T]he supposedly "bright" lines that separate interrogation from spontaneous declaration, the exercise of a right from waiver, and the adequate warning from the inadequate, likewise have turned out to be rather dim and ill defined.

> Yet *Miranda* requires those lines to be drawn with precision in each case.
>
> The totality-of-the-circumstances approach, on the other hand, permits each fact to be taken into account without resort to formal and dispositive labels. By dispensing with the difficulty of producing a yes-or-no answer to questions that are often better answered in shades and degrees, *the voluntariness inquiry often can make judicial decisionmaking easier rather than more onerous*.

Withrow, 507 U.S. at 711-12 (O'Connor, J., concurring in part and dissenting in part) (emphasis added). Thus, whether a *Miranda* inquiry or a Section 3501 totality-of-the-circumstances test is more manageable depends on the facts of the case in question. To exchange the rigidity of *Miranda*'s exclusionary rule for the flexibility of Section 3501's command to evaluate the totality of the circumstances, therefore, is not to sacrifice judicial economy.

Moreover, even if it were true that a totality-of-the-circumstances test is more complex and time-consuming than *Miranda*, that is a price that American law enforcement is willing to bear. As we have explained, officers will for the most part continue to provide *Miranda* warnings even under a Section 3501 regime; accordingly, it is only in the case when an officer for some reason (such as a technical violation) fails to stay within the safe harbor provided by the *Miranda* warnings that the supposed "difficulties" of the voluntariness test will arise. And in those cases, law enforcement officers would much prefer to take the time to assist the court in undertaking a voluntariness inquiry – even though that inquiry might be time-consuming and require consideration of an array of factors

– rather than to see the confession *automatically suppressed* (as it would be under the inflexible *Miranda* exclusionary rule).

According to the Bell *amici*, even though law enforcement officials will likely continue to administer *Miranda* warnings in a Section 3501 regime, such a regime of warnings voluntarily administered has "several obvious flaws." Bell Br. 18. But a moment's scrutiny reveals that each of the three such alleged "flaws" they identify is illusory.

The first of the "flaws" is the alleged danger of "tinkering." The Bell *amici* contend that police agencies will not be content to administer the *Miranda* warnings in their present form, and will instead "undoubtedly" alter and modify the warnings; *amici* predict that this will result in "potentially endless" litigation, and "make the policies harder to follow and undermine compliance." Bell Br. 18. But they offer no explanation at all as to why – given the near-certainty that recitation of the familiar *Miranda* script will assure admissibility of any confession (under Section 3501, no less than today) – police will "tinker" with the language of the warnings. Police will not "tinker" merely for the sake of "tinkering." They will modify the *Miranda* script only if the modification produces some appreciable benefit (such as making the policy *easier* to follow, or *reducing* litigation). And if some (perhaps impulsively creative) police departments begin "tinkering" with the *Miranda* formulation, only to find that (as the Bell *amici* predict) their "tinkering" results in "endless litigation" and harder-to-follow policies, those departments will revert to the good old *Miranda* language.

The *second* "flaw" that the Bell *amici* assert is the alleged danger that "internal regulations" will not be "as effective as *Miranda* in encouraging police to administer warnings." Bell Br. 18. But that is simply an improper comparison. *Amici* are correct to suggest that, at present, the

primary source of "encouragement" for an officer to administer warnings comes not from "internal regulations" (most of which presently require officers to administer the *Miranda* warnings), but rather from the recognition that, absent warnings, any confession from a suspect will likely be excluded from evidence. The same will be true, however, under the Section 3501 regime: the principal motivation for administering warnings to suspects (then as now) will be the recognition that, if warnings are not given, any confession obtained by the officer may ultimately be excluded (pursuant to the terms of Section 3501, rather than *Miranda*). The fact that the department's "internal regulations" require the warnings will be secondary in the officer's mind – just as it is today.

Finally, the Bell *amici* raise the possibility that some departments will altogether cease providing warnings "as the memory of the value of Miranda fades." *Id.* at 19. But that theory defies logic. Departments would stop providing warnings altogether *only if* experience showed that such a "no warning" policy had *no adverse effect* on the admissibility of confessions obtained from suspects. That is a most unlikely prospect – to put it mildly – given that Section 3501 expressly identifies warnings as one of the factors to be considered in assessing voluntariness.

CONCLUSION

For the foregoing reasons, the Fourth Circuit's decision should be affirmed.

Respectfully submitted,

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